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Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS PECORA and JAMES PAONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT REPLY BRIEF OF THOMAS PECORA AND JAMES PAONE

JUSTIN P. WALDER
Counsel of Record

WALDER, SONDAK, BERKELEY & BROGAN, P.A.
Attorneys for Petitioner, James Paone
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-5300

DINO D. BLIABLIAS
Counsel of Record

STEIN, BLIABLIAS, MCGUIRE & PANTAGES
Attorneys for Petitioner, Thomas Pecora
354 Eisenhower Parkway
Livingston, New Jersey 07039
(201) 992-1100

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

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INTRODUCTION

Pursuant to Rule 22 of the United States Supreme Court Rules, it is respectfully requested that this Court accept this reply brief to the Government's brief submitted in opposition to the Joint Petition for a Writ of Certiorari.

POINT I

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THIS CASE JOINED OR DECIDED IN CONJUNCTION WITH BOURJAILY V. UNITED STATES (No. 85-6725, CERT. GRANTED OCTO88R 14, 1986)

Petitioners urge this Court to join or determine this case in conjunction with Bourjaily v. United States (No. 85-6725, cert. granted October 14, 1986). The Government contends that there is no need to hold this case until a decision is reached in Bourjaily. (Government Brief, pp. 12-13). Petitioners vigorously disagree.

The issue in Bourjaily is the same as exists here, i.e., whether a separate judicial determination is necessary as to the reliability of hearsay statements contained in a co-conspirator's declaration as a condition precedent to its admissibility, or is the Confrontation Clause automatically satisfied when the requirements of Rule 801(d)(2)(E), Fed. R. Evid., governing co-conspirators' statements, are met. The Federal District Court in this case never addressed the reliability issue despite the fact that it was raised.[1]

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[1] Substantial issues existed as to the reliability of the critical taped conversation. Details are set forth in the Joint Petition, pp. 16-21, 55-62. The trial court found that Carratura, the Government informant, had a substantial interest in steering the conversation (A-29). Carratura, a lifetime criminal, was receiving favorable treatment from the Government on numerous crimes,
(footnote cont'd)

Moreover, in this case the petitioners were placed in a much more disadvantageous position than the defendant in Bourjaily. The declarant in Bourjaily was a co-defendant who, although he determined not to be a witness, was available to defendant to explain the conversation under joint defense confidentiality. In the case sub judice no defendant was a participant in the conversation and only the Government informant, who was determined by the trial court not to be a conspirator, testified.

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including a conviction for break and entry into a woman's apartment and stealing her jewelry, which was entered in December 1983, on the eve of the trial of this case (1/30/84 T30-9 to T31-10; 12T105-12 to 23). Both the trial court and the Third Circuit Court of Appeals acknowledged that the admission of the taped conversation was very damaging to the defense (A-20-21; 798 F.2d at 625).

The Government suggests that the Third Circuit Court of Appeals "conducted a separate inquiry" into the reliability of the coconspirator declarations in this case (Gov't. brief, pp. 12-13). The suggestion that the Third Circuit held a separate hearing on this issue is simply inaccurate. Moreover, the trial court at no time held a hearing or made any determination as to the reliability of the taped conversation as a condition precedent to its admission.[2]

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2 Moreover, the District Court in this case permitted into evidence statements of the Government informant during the taped conversation under the theory that his statements were adopted by other participants in the conversation and were therefore admissible as party admissions under Rule 801(d)(2)(B). No "party" was a participant in the taped conversation. Carratura was a Government informant at the time of the conversation. Picco and Fred Paone, participants in the conversation, were unindicted co-conspirators.
(footnote cont'd)

Another significant issue present in the Bourjaily case also exists in this matter. In Bourjaily the Sixth Circuit Court of Appeals re-confirmed the principle that the Confrontation Clause requires that both reliability and unavailability be independently proven as a condition precedent to the admission of hearsay statements, even if such statements are proffered under the coconspirator exception in Rule 801(d)(2)(E). See United States v. Bourjaily, 781 F.2d 539, 543 (6th Cir. 1986). In this case the Third Circuit Court of Appeals held that there was no requirement under the Confrontation Clause for an independent determination regarding unavailability

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Carratura's statements in the tape were clearly not adoptive party admissions under the Rule. This issue was presented to the Third Circuit Court of Appeals, but never addressed in its opinion.

where the statement fell within the co-conspirator exception. As argued in the defendants' Joint Petition, where reliability of a co-conspirator's statement is in issue, the requirement that the Government produce the declarant or demonstrate his unavailability still exists (Joint Petition, pp. 61-62).

Justice Marshall's dissent in United States v. Inadi, 106 S. Ct. 1121, 1129 n. 1 (1986), notes the existing and still unresolved conflict in the Circuit Courts relating to this issue:

> Today's decision does nothing to resolve the conflict among the lower courts as to whether declarations of co-conspirators who are not present in court for cross-examination must be shown to have particularized "indicia of reliability" before they can be admitted for substantive purposes against a criminal defendant. Compare United States v. DeLuna, 763 F.2d 897 (CA8 1985) (particularized inquiry into reliability of co-conspirator statements demanded in addition to unavailability requirement); United States v. Ordonez, 722 F.2d 530, 535 (CA9 1983) (parti-

> cularized assessment of reliability needed for every statement admitted under co-conspirator hearsay exemption); United States v. Perez, 702 F.2d 33 (CA2) (same), cert. denied, 462 U.S. 1108, 103 S. Ct. 2457, 77 L.Ed.2d 1336 (1983), with Boone v. Marshall, 760 F.2d 117, 119 (CA6 1985) (declaration admitted under co-conspirator exemption "automatically satisfies the Sixth Amendment requirements"); United States v. Molt, 758 F.2d 1198 (CA7 1985) (same); Ottomano v. United States, 468 F.2d 269, 273 (CA1 1972) (same), cert. denied, 409 U.S. 1128, 93 S. Ct. 948, 35 L.Ed.2d 260 (1973)....

Add to the conflict the Fifth Circuit's opinion in United States v. Peacock, 654 F.2d 339, 349-350 (5th Cir. 1981) and the Sixth Circuit's opinion in Bourjaily (reliability of co-conspirators' statements and unavailability must be independently proved) and the Third Circuit's opinion in this case (no need for independent proof of unavailability). See cases cited in United States v. DeLuna, 763 F.2d 897, 909-910 (8th Cir. 1985) for further indication of the split in the Circuits.

This case presents the very issue which has caused a conflict of opinions in the Circuits and requires clarification and guidance by this Court. Obviously, since the co-conspirator rule provides the most often used exception to the hearsay rule, this is an issue of substantial magnitude.

This case presents legal issues identical and incidental to the Bourjaily case presently pending before this Court. It is respectfully submitted that this case should be joined or determined in connection with the Bourjaily case.

Aside from all of the above, the Third Circuit's analysis of some of the critical factors in evaluating reliability was faulty. The Third Circuit noted that the first factor recited in Dutton v. Evans, 400 U.S. 74 (1970), relating to reliability, is whether the

declaration contained assertions of past fact. The Third Circuit stated that the extensive discussion of past events in the taped conversation was "not a mere narrative of past events" since the participants were attempting to concoct a scheme to conceal their prior criminal behavior. The Third Circuit concluded that "some discussion of past events does not render the statements unreliable." (A-28). This analysis completely ignored that the only alleged reference in the entire tape to defendant James Paone related to a disputed past meeting in April 1977 between Carratura and Fred Paone's "uncle or whoever he was" (A-237) which Mr. Paone vigorously denied as involving him (see pp. 58-59 of Joint Petition). A review of the tape indicates that it is almost entirely concerned with past events and discussions

relating thereto. There is no justification for the Third Circuit's approach to this factor.

Moreover, Carratura testified that he did not know Thomas Pecora. Mr. Picco affirmatively stated on the tape that he did not know Mr. Paone. Neither Mr. Pecora nor Mr. Paone's name was mentioned during the taped conversation. The only reference in the tape was to the alleged meeting between Carratura and Fred Paone's "uncle or whoever he was" at Don's 21. James Paone denied ever being present at such a meeting, thereby raising substantial credibility and reliability issues (see p. 59 of Joint Petition).[3] Therefore, the second

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[3] Carratura claimed that at this meeting James Paone directed him to make payments through a barber, Sam Botro, and that Carratura did so on twelve occasions from April 28, 1977 through July 4, 1977 (2/1/84), T89-11 to T91-16). Botro was unavailable to (footnote cont'd)

criterion of the Dutton test, the declarant's personal knowledge of the identity and role of the participants in the crime, was not established.

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testify at trial. Evidence discovered after trial indicated Botro was out of the country during a substantial portion of this time period from April 11, 1977 to May 16, 1977 including when Carratura claimed to have met Botro in furtherance of establishing the scheme. Affidavits and documents were presented to the trial court on defendants' motion for new trial. The motion was denied on the basis that this evidence could have been discovered prior to trial. (See footnote 3 of Joint Petition).

POINT TWO

THE GOVERNMENT'S BRIEF CONTAINS MANY FACTUAL INACCURACIES.

The Government's opposing brief contains many factual inaccuracies which improperly color the position of the Petitioners before this Court. Without discussing all of them, this portion of Petitioners' reply brief will highlight some of those inaccuracies.

The Government alleges that the subcontract between FoodHaulers and FTI "was a sham" and that "FoodHaulers used it as a means to hire drivers who are not members of Local 863, in violation of its collective bargaining agreement with Local 863." (Gov't. brief, p. 2). This was a Government theory but the evidence was to the contrary. Henry Satsky, a Government witness who negotiated the contract on behalf of FoodHaulers, stated that for many years FoodHaulers had

engaged in the practice of subcontracting out work to various independent haulers whose driver employees were represented by various unions (18T86-16 to 18T90-2). Moreover, it was without contradiction that FTI hired and fired these employees, and supervised them on a day-to-day basis (17T33-11 to 15; A492-4 to 16). This evidence was substantiated by both Government and defense witnesses.

On p. 3 of its brief the Government alleges that Thomas Pecora was engaged in making unlawful payments to James Paone from 1972 to 1981, the time period of the alleged conspiracy. Mr. Pecora was not even employed by FTI until September, 1973 (5T52-3 to 4) and only became an officer (general manager) in or about the middle of 1974 (3/1/84, T26-10 to 22), well after the alleged conspiracy began.

On p. 5 of its brief, the Government suggests that the defendants' argument is solely based upon the "contract bar rule". The Government totally ignores in its brief any reference to the Memorandum of Understanding between Joint Councils 16 and 73 of the International Brotherhood of Teamsters (IBT) which precluded Local 863 from admitting FTI employees to membership. This long-standing Memorandum of Understanding dated back to 1962, some nine years prior to the beginning of the alleged conspiracy. Its objective was to promote labor peace and avoid jurisdictional disputes between different locals of the IBT. Local 863 was barred by this internal mechanism of the IBT from seeking to represent the employees of FTI. Unrefuted expert testimony clearly demonstrated that under the circumstances of

this case Local 202 had jurisdiction to represent the driver employees of FTI and Local 863 was precluded under the jurisdictional agreement to admit to membership the driver employees of FTI (A564-12 to A567-8; A544-15 to A547-15).

In addition, the Government fails to refer to the National Labor Relations Board determination that the Memorandum of Understanding governed the jurisdiction in this matter and that Local 202 had jurisdiction over the FTI drivers.

The Government's brief suggests that the relationship between FTI and FoodHaulers began in 1972 with the institution of FTI's bakery division. The Government ignores the long-standing relationship between S. Federico (the alter ego of FTI) and Wakefern, the parent company of FoodHaulers, going back to the early 1960's, as well as Local

202's long-standing representation and jurisdiction over S. Federico and FTI drivers. (See pp. 3-5 of the Joint Petition).

On p. 6 of its brief, the Government alleges that it was stipulated that as a general matter Local 863 admitted drivers working in New Jersey. The Government omits the most important aspect of that stipulation, i.e., Local 863 admitted such drivers only "under appropriate circumstances" (3/13/84, T28-25 to T29-10).

On pp. 8-9 of its brief, the Government contends that in accordance with Fed. R. Evid. 801(d)(2)(E) the taped conversation was "in furtherance of the conspiracy". The tape clearly reflects that the individuals involved in the conversation were discussing the manner in which they would testify before a Grand

Jury regarding their past "employment" by FTI. The participants in the conversation expressed no interest in perpetuating an ongoing conspiracy and it is clear from the tape that the individuals were no longer involved in any conspiracy for a period of years. This clearly was a "cover-up" situation, not an act of concealment done in furtherance of the main criminal objectives of the conspiracy. The government would have this Court approve an automatic rule that if the conversation takes place during the course of the conspiracy it is per se in furtherance thereof. Such a rule constitutes a dangerous precedent which should be corrected by this Court.

CONCLUSION

It is submitted that this case presents legal issues identical and incidental to issues which exist in the Bourjaily case, and that petitioners' Joint Petition for a writ of certiorari should be granted. This case should be joined or determined in conjunction with Bourjaily.

Respectfully submitted,

Walder, Sondak, Berkeley
& Brogan, P.A.
Attorneys for Petitioner,
James Paone

By: Justin P. Walder
Justin P. Walder, Esq.

Stein, Bliablias, McGuire
& Pantages
Attorneys for Petitioner,
Thomas Pecora

By: Dino D. Bliablias
Dino D. Bliablias, Esq.

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